

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In re Application of

MCI COMMUNICATIONS CORPORATION

GN Docket No. 96-245

For Transfer of Control of Direct Broadcast
Satellite Authorization to British
Telecommunications plc

**REPLY TO OPPOSITION OF
MCI COMMUNICATIONS CORPORATION
AND BRITISH TELECOMMUNICATIONS PLC TO
PETITION TO DENY OR CONDITION GRANT**

PRIMESTAR Partners L.P. ("PRIMESTAR"), by its attorneys, pursuant to the Commission's *Public Notice*¹ establishing a common pleading schedule for MCI Communications Corporation's ("MCI") proposed transfer of control associated with its merger with British Telecommunications plc ("BT"), hereby replies to the Opposition of MCI and BT to PRIMESTAR's Petition to Deny or Condition Grant ("MCI Opposition" and "PRIMESTAR Petition") of the Commission's consent to the transfer of control of MCI's Direct Broadcast Satellite ("DBS") authorization.² As stated in the PRIMESTAR Petition, the public interest and U.S. trade policy compel that the Commission condition the transfer of the subject DBS

¹ MCI Communications Corporation, Public Notice, DA 96-2079, 11 FCC Rcd 17326 (1996).

² See file no. 73-SAT-P/L-96.

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authorization on a demonstration of effective competitive opportunities in the home countries of all DBS service providers, including any entities controlling the programming and information transmitted on DBS systems, as well as the DBS licensees themselves. MCI and BT fail to demonstrate why the concerns raised by PRIMESTAR do not warrant denial of the subject application. In fact, MCI and BT fail to even address the critical public policy, market access, and foreign trade issues raised by PRIMESTAR.

A. The Public Interest Demands that the Commission Apply an Effective Competitive Opportunities-Type Test to the Proposed Transfer of the DBS License Held by MCI Telecommunications Corporation.

MCI and BT argue that an effective competitive opportunities or ECO test does not apply to the DBS license for which MCI proposes to transfer control to a foreign-controlled entity. In support, MCI and BT state that (1) the Commission's International Bureau has already rejected the foreign ownership arguments of Time Warner Inc. ("Time Warner") and PRIMESTAR,³ and (2) such foreign ownership restrictions are not applicable to DBS providers.⁴

First, MCI and BT's statement that the International Bureau already has rejected PRIMESTAR's foreign ownership arguments is completely incorrect and disingenuous. In finding that MCI's DBS authorization was ready for grant, the Chief, International Bureau stated that:

We wish to emphasize, again, that this order does not prejudice, in any way, any of the applications MCI has filed to transfer control of its licenses and authorizations, including its DBS authorization, to BT. Each of the MCI transfer of control applications will be independently and intensively reviewed by [the] Commission,

³ MCI Opposition at 34.

⁴ MCI Opposition at 35.

following an opportunity for submission of comments and reply comments, for compliance with section 310(d) of the Communications Act and all other applicable statutes and rules.⁵

The International Bureau did not "reject" foreign ownership arguments that MCI's DBS authorization transfer should be subject to an ECO-type analysis. The Bureau's Order specifically states that it was merely finding that MCI's DBS authorization was ready for grant, upon payment of its remaining outstanding balance, and was in no way making a determination regarding the transfer of control applications that were already on file with the Commission.

Second, in applying the public interest standard to its consideration of the proposed transfer of control of MCI's DBS authorization to foreign interests, the Commission is free to consider foreign control of the entity that packages and markets the programming delivered over the DBS system, as well as foreign control of the licensee. PRIMESTAR did not argue in its Petition that an ECO test is specifically required by statute or Commission rule.⁶ MCI and BT are content to raise the same tired arguments in defense of the Bureau's flawed conclusions regarding the foreign ownership restrictions applicable to DBS service. However, as PRIMESTAR demonstrated in its Petition, the public interest and U.S. trade policy require that the Commission apply an ECO-like competitive opportunities test to ensure that the home market of the foreign-controlled entity providing the programming service over the subject DBS system offers comparable opportunities to U.S. firms. These concerns require an ECO-like test

⁵ MCI Telecommunications Corporation, DA 96-1793 (IB released Dec. 6, 1996) ("*Grant Order*") at ¶ 29.

⁶ PRIMESTAR Petition at 11. "PRIMESTAR addressed the inadequacies of the Bureau's reasoning in its Application for Review of the DBS Grant Order filed January 6, 1997, and will not be repetitious here."

irrespective of the specific foreign ownership restrictions contained in the Communications Act of 1934, as amended, and the Commission's rules.⁷

MCI and BT arrogantly state that the Commission does not concern itself with foreign ownership of non-licensed parties providing service over U.S.-licensed facilities. Not only is this incorrect, but it also highlights the inconsistency in regulation of U.S.-licensed satellites as well as the need to regulate the programming packagers involved in the provision of DBS service to the public.

While the Communications Act clearly requires the licensing of DBS satellites, the public interest also obligates the Commission to concern itself with the entity providing the package of programming and information transmitted over the licensed DBS system. It is absurd to suggest — as MCI has — that the Commission should ignore completely the issues associated with foreign control of DBS service providers. The Commission's responsibility to protect the public interest gives it the authority and the obligation to require that the home country of all DBS providers, including the entities responsible for the packaging and marketing of DBS services, provide U.S. firms with comparable access to those countries' markets.

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The concerns related to foreign control of the programming of the MCI DBS system have been exacerbated by News Corporation's ("News Corp.") recent announcement that a wholly-owned subsidiary will be entering into a merger with EchoStar to provide programming over not only the satellites licensed to MCI, but also over the extensive DBS system authorized to EchoStar and its subsidiaries. The approval of the subject transfer of control and the News Corp/EchoStar merger would afford News Corp., an Australian corporation, control over almost 48% of the assigned high power DBS transponders and over 52% of the assigned full CONUS DBS transponders. PRIMESTAR plans to address the proposed acquisition of control of EchoStar by News Corp. at the appropriate time.

MCI and BT also argue that no law or regulation imposes foreign ownership limitations on any non-licensee Multi-Channel Video Programming Distributor ("MVPD"). Rather than address the public policy and trade issues associated with opening foreign markets to U.S. programming entities, MCI and BT attempt to label PRIMESTAR's argument as an effort to regulate the content of the programming that is delivered over DBS systems. PRIMESTAR is not advocating any content control or restrictions over DBS programming. Instead, as clearly stated in its Petition, PRIMESTAR is gravely concerned with the trade policy and public interest consequences of allowing foreign-controlled entities to provide DBS service over U.S.-licensed DBS satellite systems, when no attempts are made to open the home markets of foreign-controlled DBS service providers to U.S. firms.

As the Commission has stated repeatedly, DBS spectrum is a scarce resource. There are only 256 high power DBS transponders allocated to the United States. Only 96 of these are capable of providing full CONUS service. Even without considering News Corp.'s recent announcement of its plans to control the programming for a combined MCI/EchoStar DBS system, the granting of the subject transfer application will result in foreign control over the selection of 100% of the programming to be provided over MCI's authorized DBS system.

B. Proper Application of Existing Foreign Ownership Restrictions Does Not Constitute Impermissible Retroactive Rulemaking.

MCI and BT claim that imposition of foreign-ownership regulations on DBS providers would: (1) constitute impermissible retroactive rulemaking; (2) be highly inequitable to MCI; and (3) call into question the regularity of the Commission's auction procedures. Once again,

MCI and BT are incorrect. First, enforcing the foreign ownership restrictions that are currently codified in the Commission's Rules, and have been since 1982, is hardly impermissible retroactive rulemaking. In fact, the International Bureau's *Grant Order* clearly ignores or changes the application of Section 100.11 of the Commission's rules to exclude non-broadcast DBS service. This change in the application of a Commission rule in a manner inconsistent with the language of the rule was accomplished without proposing a rule change in a proper rulemaking proceeding and therefore would itself constitute a violation of the Administrative Procedures Act.

Second, MCI and BT fail to establish that the proper application of the Commission's foreign ownership restriction rules would be highly inequitable to MCI. Although proper application of the Commission's foreign ownership restrictions clearly would not benefit MCI, this fact alone does not make the application of an ECO-like competitive opportunities test impermissible. MCI had notice of the Commission's DBS rules when it bid for the subject authorization at auction. In addition, it knew of the foreign ownership restrictions when it entered into its deal with BT. MCI made the decisions to bid for the authorization and merge with BT with full knowledge of the Commission's rules. Therefore, it is not inequitable to subject MCI to these rules.

Third, the Parties' complaint that the proper application of the Commission's foreign ownership restriction on DBS providers calls into question the regularity of the auction procedure is nothing more than a thinly-veiled threat which suggests that the Commission will jeopardize its ability to raise substantial revenues in the future if the agency has the temerity to insist that

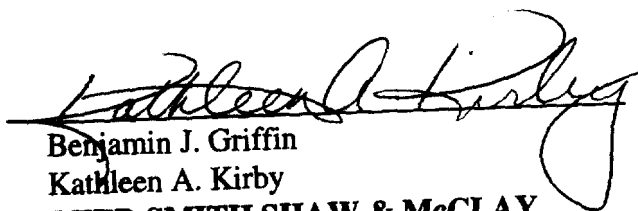
winning bidders actually be qualified to be awarded licenses and that grant of licenses to them be consistent with public policy and with FCC rules. Previously, in the context of answering challenges to its then-pending DBS application, MCI argued that once an applicant submits a winning bid, the Commission should not deny the license application. Now, MCI and BT appear to be taking the next step and argue that not only should the Commission not deny the winning bidder's application, but the licensee should be free to sell the licensed facility to whomever it wishes, regardless of the proposed assignee's qualifications or eligibility to hold the license, so as not to discourage participation in auctions. While auctions may be an efficient means for combining the awarding of licenses with the raising of revenues for the U.S. Treasury, the mere fact that a license was awarded by auction should not per se ensure winning bidders' rights to sell to whomever they wish, irrespective of legal and public interest issues raised by the proposed transaction. MCI won the DBS license at auction, it did not win the right to interpret and re-write the Commission's rules for MCI's sole benefit. Under MCI's interpretation, the public interest would be for sale to the highest bidder.

WHEREFORE, PRIMESTAR respectfully renews its request that the Commission deny MCI's application for transfer of control of its DBS authorization because MCI has failed to demonstrate that Australia, the home country of the DBS service provider News Corp., offers equivalent competitive opportunities for U.S. entities to provide programming and information in that country. Reciprocal access for DBS programming does not exist between the U.S. and Australia. Because reciprocity cannot be found between the U.S. and Australia, the MCI application must be denied.

In the alternative, if the Commission does grant MCI's application, PRIMESTAR requests that the grant be conditioned on the requirement that Australia, as the home country of the proposed DBS service provider, offer equivalent competitive opportunities for U.S. entities to provide satellite-delivered programming in that country.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jette Ward, a legal secretary with the law firm of *Reed Smith Shaw & McClay* hereby certify that a true and correct copy of the foregoing "**Reply to Opposition of MCI Communications Corporation and British Telecommunications plc to Petition To Deny or Conditional Grant**" was served this 17th day of March, 1997, via first-class mail, postage prepaid, or hand delivery, upon the following:

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